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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 39

DE FOREST HULBURD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The two opinions of the Board of Tax Appeals (R. 68–80) are reported in 21 B. T. A. 23 and 27 B. T. A. 1123. The opinion of the Circuit Court of Appeals (R. 90–100) is reported in 76 F. (2d) 736.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 11, 1935. (R. 101.) A peti-

tion for rehearing was filed on January 19, 1935 (R. 101), and was denied April 15, 1935 (R. 102). The petition for a writ of certiorari was filed May 2, 1935, and granted June 3, 1935. (R. 102.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. May the liability of a decedent for a tax of a dissolved corporation be enforced against his estate or the executors thereof under Sections 280 and 281 of the Revenue Act of 1926, notwithstanding the fact that the executors were discharged by the probate court in 1925?

2. Was notice to the executor after discharge sufficient to stay the running of the statute of limitations under Section 277 (b) and to apprise petitioner of his liability as legatee?

3. Did the court below err in holding that the executor Hulburd was liable as a legatee transferee, that question not having been raised in nor considered by the Board of Tax Appeals?

4. Is petitioner liable as the legatee of a decedent with an unpaid tax liability or as the recipient of property impressed with a trust?

STATUTES INVOLVED

The statutes involved are found in the Appendix, *infra*, pp. 34–42.

STATEMENT

From the findings of fact (R. 68–69) and the stipulation of facts by the parties (R. 36–39), the following facts are taken:

DeForest Hulburd and Hugh McBirney Johnston, residents of Illinois, were executors and trustees under the will of Charges H. Hulburd, who died January 14, 1924, a resident of Illinois. Mr. Johnston has died since the institution of this proceeding, leaving DeForest Hulburd as the only surviving executor and trustee (R. 40, 68).

DeForest Hulburd was also a legatee under the will (R. 21–22) and as such received cash of $20,685.79 in addition to other assets. (R. 59–60.)

The decedent, Charles Hulburd, in his own right owned 80 shares of stock of the Van Sicklen Company of Elgin, Illinois (R. 38).

In 1919, this Illinois corporation sold all of its assets to the Van Sicklen Speedometer Company, a Delaware corporation, and was dissolved in September of that year. In consideration for the transfer, the Illinois corporation received $250,000 and 5,000 shares of stock of the Delaware company, all of which it distributed to its stockholders. (R. 38.)

Charles H. Hulburd in his own right received $8,000 in cash and 160 shares of stock as his distributive share. (R. 38–39.)

The Illinois corporation had filed a return for the fiscal year ending September 30, 1919, in De-

cember, 1919. On November 17, 1924, the Commissioner made an additional assessment of income and profits taxes against the corporation in the amount of $227,872.06 plus a penalty of $113,936.03. These taxes have not been paid. (R. 68–69.)

On April 16, 1924, the executors had written to the Commissioner requesting that all taxes due on account of income received during the lifetime of Charles H. Hulburd be determined and assessed within one year, in accordance with Section 250 (d) of the Revenue Act of 1921. This letter made no reference to the liability of the estate as a transferee. Deputy Commissioner Bright on April 20, 1925, replied that certain income taxes of the decedent would be at once listed for assessment and the case closed under Section 277 (a) (3). (R. 69, 78–79.)

On February 26, 1925, the executors filed their final account with the probate court, which account was thereupon approved and the executors discharged. (R. 62–66, 69.)

On October 27, 1926, the Commissioner mailed a letter to the "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Illinois", asserting a liability against the estate as a transferee of the Van Sicklen Company. It was then claimed that the estate was liable to the extent of $24,000 for taxes of the corporation, but it was later admitted that the liability does not exceed $8,000 (since $16,000 was paid by decedent

to the equitable owners of the stock, R. 38), plus 6 percent interest from February 26, 1926. (R. 15–19, 69.)

On the first hearing the Board of Tax Appeals held that the collection of the deficiency was not barred by the statute of limitations. (R. 68–76.) On the second hearing the Board held that the estate was not liable as a transferee and declined to decide whether the distributees of the assets of the estate were liable. (R. 76–80.)

The Commissioner appealed and in support of the Board's decision the executor, Hulburd, urged both that there was no liability and that in any event the enforcement of the liability was barred by the statute of limitations.

The Circuit Court of Appeals reversed the Board's decision. It held that DeForest Hulburd was liable both as an executor and as a legatee and that the statute of limitations did not bar the enforcement of the liability (R. 90–100).

SUMMARY OF ARGUMENT

Upon the dissolution of the Van Sicklen Company in 1919, the decedent received a distribution of $8,000 in cash. Within the statutory period of limitations the Commissioner determined a deficiency in tax against the corporation for the fiscal year ended September 30, 1919, in the sum of $227,872.06. Hence, if the decedent had lived, the Commissioner might have instituted a suit in equity against him for the payment of $8,000, plus interest,

and after the enactment of Section 280 of the Revenue Act of 1926, *infra*, could have enforced this liability under that provision.

This liability survived the decedent's death and his executors became liable in their representative capacity for the payment of his liability to the Government as a transferee or distributee of the corporate property. The discharge of the executors was conclusive under Illinois law only as to matters presented in the final account and does not bar the Government from pursuing any available remedy to enforce the obligation of the estate. In any event, state laws barring claims against decedent's estates are merely statutes of limitation and do not run against the United States.

The notice addressed to petitioner as executor was sufficient, in the light of his subsequent petition to the Board of Tax Appeals, to stay the running of the statute of limitations. It also served to charge him with notice of his alternative liability as legatee.

The petitioner is liable for the tax as a statutory transferee because he received distributions in cash from the estate far in excess of the amount claimed by the Government. The statute (Section 280(3)(f)) expressly includes legatees, distributees, etc., within the term "transferee." Petitioner, therefore, is liable both as an executor and as legatee.

The creditor of a corporation may recover after its dissolution from distributees, whether or not the

specific property can be traced. Under Illinois law petitioner, who has received property in excess of the amount owed by the decedent stockholder, is liable for the unpaid taxes of the corporation, and this liability may be enforced under section 280.

Petitioner received funds from the decedent which in turn had been received as a dividend on dissolution of a corporation owing unpaid taxes. These moneys were impressed with a trust in favor of the Government. To the extent that the aggregate of the intermingled fund consisting of the trust funds and those of the decedent or legatee remained intact, the trust funds can be traced. Petitioner, on whom the burden rests after the Commissioner has made a *prima facie* case, has not shown that the fund was reduced below the $8,000 received from the corporation, and the Government can recover the entire amount.

ARGUMENT

I

THE DISCHARGE OF THE EXECUTORS WITHOUT NOTICE TO THE GOVERNMENT DOES NOT PREVENT THE ASSERTION OF LIABILITY AGAINST THEM WHERE THE ORIGINAL DEFICENCY WAS TIMELY MADE

In the instant case, the decedent was clearly liable as a transferee of the taxpayer for its 1919 taxes to the extent of the sum of $8,000, which he received upon the dissolution of the corporation in that year. He was liable notwithstanding the fact that the corporation acquiring the assets might also

be liable. *Hunn* v. *United States*, 60 F. (2d) 430 (C. C. A. 8th); *Fairless* v. *Commissioner*, 67 F. (2d) 475 (C. C. A. 6th); see also *Pierce* v. *United States*, 255 U. S. 398, 404–405.

The so-called transferee provisions were first incorporated into the Federal tax system by the Revenue Act of 1926, Sections 280 and 281, *infra*. Section 280 provides for the assessment and collection, in the same manner as in the case of a deficiency in a tax, of "the liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax" imposed upon the taxpayer under that Act or any prior income or profits tax act. Section 281 provides that where the Commissioner has notice of any person acting in a fiduciary capacity for the person subject to the liability specified in Section 280, the fiduciary shall assume, on behalf of such person, the same liability (except it shall be collected from the estate of such person) *"until notice is given that the fiduciary capacity has terminated."*

These provisions did not create a new liability on the part of the transferees but provided the Government with a new remedy for enforcing the existing liability, theretofore enforcible only by bill in equity or action at law. *Phillips* v. *Commissioner*, 283 U. S. 589, 594, 601; House Conference Report No. 356, 69th Cong., 1st Sess., pp. 43, 44.

The constitutionality of Section 280 as applied to the enforcement, against the executors of a stock-

holder-transferee, of tax liability arising under a prior revenue act was upheld by this Court in the *Phillips* case, *supra*. Although the question of the retroactive application of Section 281, involving the liability of fiduciaries, appears not to have been raised, it was the executors of the stockholder-transferee in that case who appealed to the Board and who were finally held to be liable, as the court below likewise held in the instant case. See *Phillips* v. *Commissioner*, 42 F. (2d) 177 (C. C. A. 2d). The facts in the *Phillips* case are substantially identical with those presented here, except that there the executors had not been discharged at the time the Commissioner asserted liability against the estate.

Petitioner contends, in short, that the discharge of the executors and distribution of the estate has barred the Government from asserting any claim against the executors in their representative capacity. It is submitted that this circumstance cannot bar the United States from the collection of taxes to which it is entitled.

Although relying upon their discharge to terminate any liability of the decedent's estate for taxes, the executors here did not wait the full year provided by Section 250 (d), *infra*, before distributing the estate and requesting discharge. The request to the Commissioner, for determination of all income taxes due from the decedent was made April 16, 1924 (R. 27-28); the Commissioner answered

April 20, 1925, asserting deficiencies on account of the decedent's own income for the years 1922 and 1923 (R. 28). The executors, before the expiration of the year, had on February 26, 1925, filed their final account (R. 49–64) and asked to be discharged. The request was granted on the same day. Thus, it appears that as to the decedent's own taxes for the years 1922 and 1923, deficiencies were asserted by the Commissioner on April 20, 1925 (approximately two months after their discharge) and, certainly, as to these deficiencies the premature discharge of the executors could not defeat the Government's claim. Similarly, it is submitted, such a discharge was ineffective as to the decedent's transferee liability and constituted no bar to its assertion and enforcement upon discovery by the Commissioner.

Whether or not the executor is liable for taxes assessed after his discharge is a matter of congressional intent. *Rankin* v. *Barton,* 199 U. S. 228; *Christopher* v. *Norvell,* 201 U. S. 216, 235; *Phillips* v. *Commissioner, supra,* 602–603. In *Forrest* v. *Jack,* 294 U. S. 158, which involved a liability of a stockholder of an insolvent national bank, this Court gave effect to the Utah law which exempted the fiduciaries but imposed a liability upon the estate of the deceased stockholder. It was held (p. 162):

> He [the Comptroller] acts under federal authority, and in respect of such determinations, orders and assessments may not be

> trammeled, controlled or prevented by state laws. In the absence of federal enactments relating to procedure for enforcement of the liability imposed by Section 66 [U. S. C., Title 12], collection is to be made in accordance with state laws governing claims against estates of deceased persons, at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority.

Thus, the question to be decided is whether Congress intended that the executor be immune after his discharge.

Since Congress professed to create no new liability, the question divides into two parts: (1) Under preexisting law, was the executor liable? (2) If not, was his immunity a true absence of liability or merely the availability of a valid plea in bar, akin to a statute of limitations?

1. The liability of a transferee for taxes due from the transferor would, in the absence of Federal legislation, be determined in the light of ordinary equitable principles. If the status of the executor were such that discharge interposed no bar to enforcement against him, he would be liable in equity and equally under the new procedure provided by Section 280. To determine his status, in the absence of Federal legislation, it is necessary to look to the State law. *Forrest* v. *Jack, supra,* 163; *Phillips* v. *Commissioner, supra,* 602–603.

It seems that in Illinois the discharge of the executor and distribution of the estate imposes no bar to the collection of this tax. The Illinois statutes contain no relevant provision as to discharge[1] and the rule of law in that State is that a discharge of executors is conclusive only as to matters presented in their accounts. *Starr* v. *Willoughby*, 218 Ill. 485; *Diversey* v. *Johnson*, 93 Ill. 547; *Fraser* v. *Fraser*, 149 Ill. App. 186; *Maguire* v. *City of Macomb*, 293 Ill. 441. In the *Starr* case, *supra*, the court said (p. 493):

> And it has been repeatedly held by this court that an order of the county court discharging an administrator or executor on a final accounting when the estate is not fully settled, as to the unsettled portion of the estate is void.

See also *Griffith* v. *Godey*, 113 U. S. 89; Woerner, *American Law of Administration* (3d Ed.), Vol. 3, p. 1960; Schouler on Wills (5th Ed.), Vol. 2, Sec. 1528.

The nonconclusive effect of the Illinois executor's discharge operates to permit suit on claims which arose after the termination of his administration. This is shown by Sections 119–120 of Chapter 3 of Cahill's Illinois Statutes (1929), which provide that the executor may require a bond from the dis-

[1] The statutes provide merely that no final settlement shall be approved until legatees and creditors whose claims have not been satisfied are notified, and require yearly settlements until administration is fully completed. Cahill's Illinois Revised Statutes, 1929, c. 3, Section 114.

tributees to indemnify him should the distributees fail "to refund the due proportion of any debt which may afterwards appear against the estate."

In *Cutright* v. *Stanford*, 81 Ill. 240, it was held that an administrator could recover from the distributees the amount of a stockholder's liability of the decedent which arose and was paid by him a year after the distribution of the estate and his discharge. In *Mortimer* v. *Potter*, 213 Ill. 178, 182, the receiver of a national bank enforced a stockholder's liability of the decedent. The court said:

> * * * at the time the administration of his estate was closed the claim had not accrued. The liability arose more than twenty years after the expiration of the two years within which claims could have been filed against it in the probate court. But the remedy under the act of Congress is applicable, and the estate is liable under its provisions so long as the assets can be reached. * * *

The liability, it seems, may also be enforced against the legatee, even without an unsatisfied judgment against the executor. In *Sutherland* v. *Harrison*, 86 Ill. 363, the devisees forced the sole legatee to satisfy a vendor's lien on real estate, since it was also a personal debt of the decedent. While not directed toward the liability of the executor, the court's language (pp. 370–371) is instructive.

> There is the minor objection taken that the settlement of the estate and discharge of

> the administrators by the probate court; and the former suit between the parties, should be held as conclusive of the right of appellant to all the personal estate.
>
> The settlement of the estate involved nothing in respect to the validity of this debt in question.
>
> Not having matured during the time of the administration, it does not appear to have been proved or presented for settlement, the creditor relying, as would seem, on his vendor's lien. * * *
>
> Neither the settlement of the estate, nor such suit, determined the right of appellant to any specific personal property as regards quantity or amount, and we do not perceive wherein they can be held to have the effect to preclude appellees from enforcing their right to have the personal estate of the decedent applied to the payment of his debt.

Therefore, even though the Revenue Act of 1926 created no new liability, the petitioner's liability could have been enforced in an ordinary equity action under Illinois law. It follows that it could be enforced by the alternative remedy provided in Section 280.

2. Even were this liability thought one which is ordinarily unenforceable under the State doctrine of discharge, it could be enforced by the United States.

The original liability of the executors, as the representatives of a transferee, is clear. *Phillips* v. *Commissioner, supra.* Their asserted immunity

from collection by the Government rests upon the equivalent of a plea in bar, that the collection may no longer be made. This plea takes the form that the State statute of limitations prevents collection. The State law is not in terms a statute of limitations, in the ordinary sense of providing for the dismissal of suits brought after a specified period. Instead, petitioner argues (mistakenly, as we have demonstrated, *supra*, pp. 12–14) that the State law bars collection, not after a definite period, but after a specified event, discharge and distribution. Since the original liability remains untouched and is not extinguished (*Campbell* v. *Holt*, 115 U. S. 620, 628), this bar to collection must relate only to the remedy and is no more than a statute of limitations.

It is well settled that State statutes of limitation do not bar against a claim of the United States. *United States* v. *Nashville & St. Louis Ry. Co.*, 118 U. S. 120; *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 125; *United States* v. *Whited & Wheless*, 246 U. S. 552, 561; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Phillips* v. *Commissioner*, *supra*, 602–603.

It follows that the liability of an estate for unpaid taxes cannot be defeated by interposing the bar of discharge and distribution. Even were this a good plea under State law, it would be no more than a plea of a statute of limitations and could not be applied to a tax claim of the United States. Two cases in the Board of Tax Appeals have so

held. *Evans* v. *Commissioner*, 12 B. T. A. 334; *Kaufman* v. *Commissioner*, 15 B. T. A. 141, affirmed, 44 F. (2d) 144 (C. C. A. 3d).

There is no merit to petitioner's argument that the "defunct" character of the estate, or the "nonexistent" status of the executors, can bar the application of this statute. State laws, prescribing the time when a dissolved corporation shall be considered defunct, or claims against its transferees or officers barred, are ineffective against a tax claim of the United States. *Phillips* v. *Commissioner*, *supra*, 602–603; *In re Wolf Mfg. Industries*, 56 F. (2d) 64 (C. C. A. 7th); *Commissioner* v. *Renyx*, 66 F. (2d) 260 (C. C. A. 2d); *Baumgartner* v. *Commissioner*, 51 F. (2d) 472 (C. C. A. 9th); certiorari denied 284 U. S. 674; *Buzard* v. *Helvering*, 77 F. (2d) 391 (App. D. C.).

The cases relied upon by the petitioner may be distinguished upon the facts and, in any event, do not require a like result here. In *Liebman's Committee* v. *Commissioner*, 54 F. (2d) 527 (C. C. A. 2d), the Commissioner was held without power to assess a deficiency against a former fiduciary, although there had been no notice of his discharge prior to the Government's assertion of liability under Section 281 (a), *infra*. That case involved not an executor but guardians of a mentally incompetent person, and the court held that the committee's authority ceased absolutely with the incompetent's death and was not revived by Section 281 (a),

subsequently enacted. Although the opinion uses language which is opposed to the approach of the court below, we believe the fact that the power and fiduciary capacity of the committee exists only during the life of the incompetent, while the executor has a continuing status as the representative of the decedent, justifies a difference in the application of the statute. Moreover, the Commissioner in the *Liberman's Committee* case, had at least a constructive notice of the discharge, and here he did not.

Lindley v. *United States*, 59 F. (2d) 336 (C. C. A. 9th), was a suit to recover an erroneous refund, not a proceeding to enforce a transferee liability, and the court, basing its decision on California law regarding administration of estates,[2] held that the Government could recover from the legatees to whom the erroneous refund had been paid over, but not from the executors.

For the foregoing reasons, it is submitted that under State law the liability of the estate for the decedent's debts did not cease upon the executor's discharge, but was alive when the Revenue Act of 1926 was passed and became enforcible under the

[2] For example, if a California estate is closed without payment of a debt, the creditor has no remedy except that if he had no notice he may sue the executor on his bond. See Sec. 955 of Probate Code, Deering's Code of Civil Procedure and Probate Code, 1931. There is no corresponding provision in the Illinois statutes. See Cahill's Illinois Revised Statutes, 1929, c. 3, Secs. 114, 119–120.

new procedure provided for therein. In any event, any State period of limitation which may be found in its law of decedents' estates cannot defeat a tax claim of the United States. Under either theory, we maintain the petitioner is liable as the surviving executor.

The petitioner's construction (Br. 14–17) of the court's statement (R. 96) with respect to the remedy created and defined by Sections 280 and 281, and the assumption based thereon that the court misapprehended the nature of the *remedy* provided by Sections 280 and 281 is believed to be erroneous. As pointed out above, the legislative history of these provisions and this Court's decision in the *Phillips* case, *supra,* make it abundantly clear that these sections of the statute did not create a new right but merely provided an additional remedy for enforcing the existing right against transferees in proceedings like those applicable to an original taxpayer. Although the language of the opinion referred to may not be particularly apt, it is submitted that it appears from the context thereof the court had in mind the Commissioner's *right* to enforce the *remedy* provided by these new sections as distinguished from any *other remedy* which the Commissioner might have invoked under the *trust fund theory.*

II

THE DEFICIENCY NOTICE WAS SUFFICIENT TO STAY THE RUNNING OF THE STATUTE OF LIMITATIONS AND TO CHARGE PETITIONER WITH NOTICE OF HIS LIABILITY AS LEGATEE

1. The deficiency notice was addressed to "Estate of Charles H. Hulburd, c/oor DeForest Hulburd, 86 East Randolph Street, Chicago, Illinois." (R. 15.) Petitioner argues that this notice was insufficient to stay the running of the statute of limitations, because the estate was not in existence at the time and the executors had been discharged.

But petitioner, with the other executor, petitioned the Board of Tax Appeals for redetermination of the tax. Their petition described themselves as "the persons appointed executors". (R. 5, 10.) It is well settled that those who petition the Board for redetermination are estopped from questioning either the jurisdiction of the Board or the sufficiency of the notice. *Commissioner* v. *New York Trust Co.*, 54 F. (2d) 463 (C. C. A. 2d), certiorari denied, 285 U. S. 556; *Haag* v. *Commissioner*, 59 F. (2d) 516 (C. C. A. 7th); *Burnet* v. *San Joaquin Fruit & Investment Co.*, 52 F. (2d) 123 (C. C. A. 9th); *Warner Collieries Co.* v. *United States*, 63 F. (2d) 34 (C. C. A. 6th); *American Equitable Assurance Co. of New York* v. *Helvering*, 68 F. (2d) 46 (C. C. A. 2d); *Continental Products Co.* v. *Commissioner*, 66 F.

(2d) 434 (C. C. A. 1st); *Buzard* v. *Helvering*, 77 F. (2d) 391 (App. D. C.); *Commissioner* v. *Nichols & Cox Lumber Co.*, 65 F. (2d) 1009 (C. C. A. 6th); *Pittsburgh Terminal Coal Corp.* v. *Heiner*, 56 F. (2d) 1072. (W. D. Pa.)

The petitioner relies upon *Nauts* v. *Clymer*, 36 F. (2d) 207 (C. C. A. 6th). The notice there was sent to one of three former executors, three years after their discharge. No appeal was taken to the Board for a redetermination. The Circuit Court of Appeals properly held that the notice was insufficient.

Moreover, petitioner as executor was liable both under Illinois law and because his plea of discharge was ineffective against a tax claim of the United States (see *supra*, pp. 11–16). The distribution of the estate and the discharge of the executor were thus immaterial to the liability of petitioner as executor, and the deficiency notice was properly sent to him.

2. The notice was also sufficient to charge petitioner with his individual liability as transferee of the corporate assets and legatee of the decedent who received cash on dissolution of the corporation. He was charged with knowledge of the Illinois law which enabled the executor to recover from the distributee of the estate the amount which had been paid after distribution and discharge. *Cutright* v. *Stanford*, *supra*. He was charged with knowledge that as a legatee he was individually subject to the tax liability. *Sutherland* v. *Harrison*, *supra*.

The deficiency letter is not a formal common law pleading but is designed to secure substantial justice both to the taxpayer and to the Government. The Commissioner, who apparently had received no notice of the termination of the fiduciary capacity, naturally addressed the notice to petitioner as executor. It does not seem that petitioner should be heard to say that the letter he received in one capacity gave him no notice of his liability in another capacity.

The record shows that petitioner appeared before the Board of Tax Appeals not only as an executor but also individually as a legatee. (R. 5–6, 75, 85, 89, 90, 101.) It follows, therefore, that he is estopped to contest the sufficiency of the notice in either capacity (*supra*, pp. 19–20), and the Board had full power to impose liability on petitioner in either capacity. The Circuit Court of Appeals properly reversed for erroneous failure to do so.

Even had petitioner not appeared before the Board in his individual capacity, the liability could be imposed. If this notice were insufficient to base an assessment against petitioner as legatee, it is also insufficient to stay the statute of limitations as to him in this capacity and the Government will forever be barred from collection of a tax rightly due to it. In such a case petitioner cannot avoid the tax by formalistic and technical objections to the address which was typed at the head of the sixty-day letter.

Were petitioner as executor bringing suit for refund of taxes allegedly erroneously collected, the Government could plead his liability as legatee by way of recoupment. *White* v. *Stone*, 76 F. (2d) 136 (C. C. A. 1st), certiorari denied, October 14, 1935, No. 202; see *Lewis* v. *Reynolds*, 284 U. S. 281; *Bull* v. *United States*, 295 U. S. 247. True, this is a summary proceeding by way of deficiency notice and assessment. "But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign." *Bull* v. *United States*, *supra*, 260.

It has so been held in several courts of appeals. In *Haag* v. *Commissioner*, *supra*, the Commissioner sent the deficiency notice to the executrix. She had been discharged prior to receipt of the notice. The court held the notice sufficient because (p. 518):

> * * * the legatee under the will of her deceased brother became liable for the tax which, but for the completed administration of the estate, would have been assessed against [herself as] the executrix * * *."

In *Warner Collieries Co.* v. *United States*, *supra*, action taken by the representatives of both the transferor and transferee corporations, in the name of the transferor which had dissolved long before the deficiency notice was sent, was held to bind the transferee. In *Buzard* v. *Helvering*, *supra*, a petition to the Board, taken by the trustees of a corporation which was dissolved before receipt of a

deficiency notice to the corporation, was held to bind them as trustees, although the petition was in the name of the corporation.

Similarly, action taken by petitioner as executor cannot without injustice be held to have no application to his alternative liability as legatee.

III

IF NOT LIABLE AS EXECUTOR, THE PETITIONER WAS LIABLE AS A LEGATEE

The court below held the petitioner liable as a legatee, he having received one-half of the residuary estate of the decedent. The sum received (approximately $20,000, R. 60) was far in excess of the liability of the decedent, in the amount of $8,000. Although the language of the court's opinion (R. 98) is not entirely clear as to whether the court intended to hold this petitioner liable for only one-half of the tax ($4,000) or for the entire liability ($8,000), it is submitted this Court's decision in the *Phillips* case, *supra,* compels the conclusion that if the petitioner is liable at all as a legatee, or distributee, he is liable for the full amount and not the pro rata share thereof based upon the proportion of property which he received.

The court below held that the petitioner's liability as a legatee came within the language of Section 280 (3) (f), which provides:

> As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

It is submitted that this is a reasonable construction of the statute. Cf. *Baumgartner* v. *Commissioner, supra; Rankin* v. *City of Big Rapids,* 133 Fed. 670 (C. C. A. 6th). If it be objected that this section refers only to the legatee of a taxpayer, it is sufficient that a transferee is considered to be a taxpayer where necessary to avoid injustice. *United States* v. *Updike,* 281 U. S. 489, 493; *Liberman's Committee* v. *Commissioner, supra.*

Petitioner's chief challenge to the court's enforcement of his liability as legatee is based upon the fact that his liability as such was not raised before the Board of Tax Appeals. (R. 94.) From this it is argued the court was without authority to consider the question. While some of the circuit courts of appeals have declined to consider issues not raised before the Board,[3] it is submitted such a construction of the statute "is not consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals" (*Helvering* v. *Taylor,* 293 U. S. 507, 516), or with the jurisdiction of the circuit courts of appeals to affirm or reverse "as justice may require." Section 1003 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110.

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[3] *Helvering* v. *J. L. Brandeis & Sons,* 75 F. (2d) 487, 489 (C. C. A. 8th); *Tulsa Tribune Co.* v. *Commissioner,* 58 F. (2d) 937 (C. C. A. 10th); *Glassell* v. *Commissioner,* 42 F. (2d) 653 (C. C. A. 5th); *Hartley* v. *Commissioner,* 72 F. (2d) 352 (C. C. A. 8th), affirmed on other grounds by this Court, 295 U. S. 216; *Tricou* v. *Helvering,* 68 F. (2d) 280 (C. C. A. 9th).

The issue before the Board is the correctness of the deficiency and not the Commissioner's method of arriving at it (*Hughes* v. *Commissioner*, 38 F. (2d) 755 (C. C. A. 10th); *Atlanta Casket Co.* v. *Rose*, 22 F. (2d) 800 (C. C. A. 5th)), and when the facts are not in dispute and no additional evidence is required to present the new issue, we think the court may entertain it, if it chooses to do so. The following cases have so held: *Helvering* v. *General Utilities & Operating Co.*, 74 F. (2d) 972 (C. C. A. 4th);* *Virginia-Lincoln Furniture Corp.* v. *Commissioner*, 56 F. (2d) 1028 (C. C. A. 4th); *Commissioner* v. *Norfolk Southern Ry. Co.*, 63 F. (2d) 304 (C. C. A. 4th); *Griffiths* v. *Commissioner*, 50 F. (2d) 782 (C. C. A. 7th); *Lewis-Hall Iron Works* v. *Blair*, 23 F. (2d) 972 (App. D. C.); *L. J. Cristopher Co.* v. *Commissioner*, 55 F. (2d) 530 (App. D. C.); *Hurwitz* v. *Commissioner*, 45 F. (2d) 780 (C. C. A. 2d); *Seufert Bros. Co.* v. *Lucas*, 44 F. (2d) 528 (C. C. A. 9th). In other cases the appellate court has properly refused to consider issues not raised before the Board and as to which the record contained insufficient information for their determination. *Sakaba Oil Corp.* v. *Commissioner*, 71 F. (2d) 370 (C. C. A. 5th); *Atkins' Estate* v. *Lucas*, 36 F. (2d) 611 (App. D. C.).

Moreover, this Court will consider on certiorari, questions passed upon by the Circuit Court of Appeals but not raised in nor considered by the trial

* Now pending before this Court on writ of certiorari, No. 41, October Term, 1935.

court. See *Friend* v. *Talcott*, 228 U. S. 27, 36, wherein it is stated:

> There is a contention that the questions of waiver and election, although passed on by the court below, are not open for our consideration because it is asserted they were not raised in or considered by the trial court. As we think the contention is without merit, we proceed to dispose of the propositions concerning election and waiver and *res judicata*.

The ordinary refusal of appellate courts to pass upon issues which were not raised below is a rule of practice only, and involves no limitation of judicial power. *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Cole* v. *Ralph*, 252 U. S. 286, 290; *Chase, Jr.*, v. *United States*, 256 U. S. 1.

In the circumstances here, we think that the court below had power to consider the question whether the petitioner was liable as a legatee. That question and the question whether he was liable as an executor turned on the same basic facts, and in reality were but different theories of the same general issue, namely, whether the petitioner was liable as a *transferee*.

The petitioner further contends that he was not liable as a legatee, since the Commissioner failed to prove that any part of the $8,000 in cash which was distributed to the decedent came into his hands. The Commissioner proved that the petitioner as residuary legatee received in cash from the decedent's estate an amount far in excess of

the sum of $8,000. We believe that it is sufficient to make him liable as a statutory transferee, and that it is not necessary to prove that the particular dollars that were transferred from the taxpayer to the decedent were thereafter transferred to the petitioner. *Phillips* v. *Commissioner, supra.* And see *infra,* pp. 27–28, 29–32.

IV

PETITIONER IS LIABLE AS ONE WHO HOLDS PROPERTY OF A CORPORATION WHICH DISSOLVED OWING UNPAID TAXES; AND HIS LIABILITY MAY BE ENFORCED BY THIS SUMMARY PROCEEDING

It is well-settled that a stockholder who receives property or money on the dissolution of a corporation is liable for unpaid debts of the corporation to the extent of the distribution to him. *Curran* v. *Arkansas,* 15 How. 304, 307; *Capps Mfg. Co.* v. *United States,* 15 F. (2d) 528 (C. C. A. 5th); *United States* v. *Garbutt,* 35 F. (2d) 924 (C. C. A. 10th); *Hatch* v. *Morosco Holding Co.,* 50 F. (2d) 138 (C. C. A. 2d); Cook on Corporations (8th Ed.), Sec. 641. Cf. *Angle* v. *Chicago, St. Paul Ry. Co.,* 151 U. S. 1, 26; *Russell* v. *United States,* 278 U. S. 181; *Phillips* v. *Commissioner, supra,* 592, and cases there cited.

This liability is often expressed in terms of a trust fund, but the relationship is in reality that of the debtor to his creditor. Another view, producing the same result, is that the stockholder takes the property impressed with a trust and is liable

for breach of the trust if he converts the property to his own use. Cf. *Oliver* v. *Piatt*, 3 How. 333, 401. None of the cases above cited has required that the creditor trace the specific property in order to subject the stockholder to liability. In some cases the inapplicability of the requirement that there be tracing has expressly been recognized. *McWilliams* v. *Excelsior Coal Co.*, 298 Fed. 884, 886 (C. C. A. 8th); *Hutton* v. *Commissioner*, 59 F. (2d) 66 (C. C. A. 9th); Fletcher on Corporations (1933), Sec. 8161.

It follows that the decedent and his representatives were liable for these unpaid taxes, whether or not the cash received from the corporation could be traced. This liability must, under Illinois law, in turn be assumed by the legatee, who has received assets from the estate in excess of this indebtedness of the decedent. *Sutherland* v. *Harrison, supra; Cutright* v. *Stanford, supra;* see also *supra*, pp. 12–14.

Since Section 280 provided a new remedy for the preexisting liability (*Phillips* v. *Commissioner, supra*, 594), the liability may be enforced under the summary procedure.

If this Court should hold that petitioner as a legatee of a transferee is not a transferee within the meaning of Section 280 (f), this does not preclude his liability predicated on the present ground. The section provides that the term transferee "includes" a legatee, etc. This plainly means "embraces", and not (if this Court should correspond-

ingly construe Section 280 (f), that none but a legatee of a taxpayer may be a transferee. See *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121. The fact that petitioner is also a legatee, and even that he acquired the decedent's property by legacy, is wholly fortuitous to his status as one against whom may be enforced claims under Section 280 (a). If there be doubt, the provision must be examined in the light of the history of tax enforcement and the purpose of the provision. *Helvering* v. *Morgan's, Inc., supra,* 126. It cannot be thought that Congress, in providing a more effective and expeditious remedy, intended to narrow the class of persons subject to the liability.

V

PETITIONER IS LIABLE AS THE RECIPIENT OF PROPERTY IMPRESSED WITH A TRUST AND HIS LIABILITY MAY BE ENFORCED BY THIS SUMMARY PROCEEDING

The petitioner is liable under the trust fund theory, irrespective of the construction this Court may give to Sections 280 and 281 or the Illinois law of decedents' estates. One who receives property from a transferor who owes the Government unpaid taxes takes this property impressed with a trust in favor of the Government. *Phillips* v. *Commissioner, supra,* 592. This is the case whether he takes it directly or through an intervening party. *May* v. *LeClaire,* 11 Wall. 217; *Bayne* v. *United States,* 93 U. S. 642. Petitioner seeks to escape this liability by the contention that the cash which

he received as legatee has not been shown to be comprised of the specific dollars which the decedent received from the dissolved corporation. In arguing that it is necessary that specific dollars be traced, petitioner confuses the nature of the trust fund doctrine.

Recognizing that it would always be impossible to trace the specific dollars which were impressed with a trust, the courts do not require that one be able to point to a given dollar bill and say that it is held in trust for the rightful owner. Equity, to avoid injustice, erects a conclusive presumption that the money of the rightful owner is the last to be withdrawn from the intermingled fund. *Knatchbull* v. *Hallett,* L. R., 13 Ch. 696; *National Bank* v. *Insurance Co.,* 104 U. S. 54, 66–70.

Thus, to the extent that the fund remains intact, to that extent is the rightful owner able to trace his money and impress the fund with a trust. *St. Louis & S. F. R. R.* v. *Spiller,* 274 U. S. 304, 309–310, relied upon by petitioner, does not hold to the contrary. There the claimant was unable to trace his money into any specific fund and he failed to show that any specific fund, as opposed to the aggregate of all the separate deposits, remained intact throughout the twelve years after the wrongful taking. Since the burden was on him, he was properly held not to have succeeded in tracing his money so as to impress it with a trust.

The final formulation of the trust fund doctrine by this Court was in *Jennings* v. *United States F.*

& G. Co., 294 U. S. 216, 224. There the Court stated that "a trust so created will not fail though other dollars may have taken the place of those originally received, for dollars are fungibles and any one of them will be accepted as substitute for another."

In the present case the decedent received a dividend on dissolution of a corporation which owed the United States a large amount of unpaid taxes. His executors transmitted to petitioner, as legatee, a sum much in excess of that received by the decedent from the corporation. Although the burden is placed upon the Commissioner "to show that a petitioner is liable as the transferee of property of a taxpayer" (Section 602 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 873), he had established a *prima facie* case when he showed these facts. *Hutton* v. *Commissioner*, 21 B. T. A. 101, 103, 59 F. (2d) 66, 69. Thereafter the petitioner, to rebut this case, must assume the general burden resting on all petitioners before the Board of Tax Appeals. *Welch* v. *Helvering*, 290 U. S. 111, 115; *Old Mission Co.* v. *Helvering*, 293 U. S. 289, 294. Further, petitioner alone has full access to and knowledge of the records of the decedent, who was his father (R. 19); the executors, of whom he was one; and the legatee, who is petitioner himself. If he fails to produce evidence so peculiarly within his knowledge, the presumption must be against him. *The Aurora*, 7 Cranch 382, 387; *Runkle* v. *Burnham*, 153 U. S. 216, 225; *Kirby* v. *Tallmadge*, 160 U. S. 379, 383. In the face of this double burden which the petitioner

must carry, he has offered nothing to show that the funds, with which the dividend was paid decedent on the corporation dissolution, have not remained intact to the extent of the $8,000 which the decedent received. It follows that the moneys received by petitioner must be taken to be those paid decedent by the corporation on its dissolution, and which were rightfully due the United States for unpaid taxes.

Petitioner, therefore, is liable under the equitable doctrine of the trust fund, independent of any statutory provision and of the Illinois law of decedents' estates.

Since Section 280 provided a new remedy for the preexisting liability (*Phillips* v. *Commissioner, supra,* 594), the liability of petitioner as a recipient of property impressed with a trust may be enforced under this summary procedure. This is the case irrespective of the construction which this Court may place upon Section 280 (f). See pp. 28–29, *supra.*

Petitioner and the Government unite in calling to the attention of the Court *United States* v. *Myers,* (Equity No. 4300, N. D. Ohio), decided September 13, 1935. In an unreported memorandum, the trial court held that the United States, bringing suit under the trust fund theory, could not recover a transferee liability of a decedent where there was no evidence that his estate presently possessed any of the assets of the taxpayer. The case did not arise under Sections 280 and 281, and the Government as plaintiff was considered not to have

carried its burden of tracing the assets. The case is thus thought not to be in point, since here the burden seems properly to rest upon petitioner. A motion in arrest of judgment and for a rehearing has been made.

In his brief on the merits, petitioner seems to have abandoned the contention raised in his petition for writ of certiorari (Petition, p. 2), that Sections 280 and 281 of the Revenue Act of 1926, as construed and applied by the court below, violate the Fifth Amendment. Since petitioner's brief does not discuss this point, although it is included in the assignment of errors (Brief, p. 9), the Government deems unnecessary to answer it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

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OCTOBER 1935.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227, 264:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of

the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided,* That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 299:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes", approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. * * *

(U. S. C., Title 26, Sec. 1057.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(U. S. C. App., Title 26, Sec. 1048.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for

other purposes", approved October 3, 1913, the Revenue Act of 1916, and Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

(U. S. C. App., Title 26, Sec. 1057.)

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the tax-

payer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act, but assessment against the taxpayer was made within such period, then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

* * * * *

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

(U. S. C. App., Title 26, Sec. 1069.)

SEC. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the

purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(U. S. C. App., Title 26, Sec. 1070.)

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

(U. S. C. App., Title 26, Sec. 1064.)

SEC. 1005. (a) The decision of the Board shall become final—

* * * * *

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected. * * *

(U. S. C. App., Title 26, Sec. 1228.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 870:

SEC. 505. SAME—TRANSFEREE CASES.

(a) Section 280 (d) of the Revenue Act of 1926 is amended to read as follows:

"(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the

mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter."

* * * * *

REVISED STATUTES

SEC. 3467. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

(U. S. C., Title 31, Sec. 192.)

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